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THE RIGHT TO TRY THE TITLE OF A DE FACTO OFFICER BY INJUNCTION

By Francis A. Darnieder, '17

The days of January, 1913, were stirring ones indeed at the state capitol. Leading up to the legislative session of that year there was much factional strife among those who, generally speaking, were opposed to the Democratic party. The contest at this time centered particularly about the office of speaker of the house. Mr. Ekern, insurance commissioner and appointee of Mr. Mc Govern, governor, publicly made known his preference. It was antagonistic to the faction supposed to represent the executive. In that situation the latter caused a complaint to be filed by one of his office force against Mr. Ekern charging him with misconduct in office because of political activity contrary to the statutes. Upon this complaint, the governor served upon Mr. Ekern an order to show cause why he should not be removed. The order was served at ten o'clock and on the same day after the formality of a hearing, conducted in mad haste by the governor, apparently for the purpose of enabling him to render his decision before twelve o'clock, when the legislature convened, Mr. McGovern, at eight minutes to twelve, noon, issued an order for the removal of the commissioner. Mr. Anderson was appointed to fill the vacancy thus declared. But the commissioner refused to surrender and then hostilities commenced.

The picturesque charge of the governor's light brigade on that day might be inscribed upon the gilded scroll with the sieges of Saragossa, Delhi, Troy or Armageddon. It was the governor's move and he was not slow to act. Calling a council of war he ordered Gen. Essman with a brigade of capitol policemen to storm the Ekern citadel. The army advanced and, the terms of unconditional surrender being refused, began the bombardment. The defense lent a stout resistance barricading the inner doors with decks and chairs. Windows were broken and blood flowed freely from Gen. Essman's thumb. They fought bravely but the fort was falling when Ekern's attorney charged across the capitol green with reinforcements and saved the day. The reinforce-

ments were in the form of a temporary injunction restraining the invading army from proceeding further. So ended the bloody horrors of the day.

Dramatic as were the features and keen as was the interest aroused in this fiasco, in and beyond the confines of Wisconsin, yet of far greater import to the profession, and more far reaching in its consequences was the legal battle which ensued when the Dane County Circuit Court refused to make permanent the temporary injunction and an appeal from its decision was carried to the Supreme Tribunal of the state.

The case has many interesting features but they are not within the purview of this treatise. But what we are interested in is the fact that the court was brought squarely face to face with the proposition, whether an officer de facto, as was Mr. Ekern in this case, in good faith claiming right to possession of the office of insurance commissioner, might maintain an action in equity to prevent forcible disturbance of such possession, and whether he might and should have temporary injunction protection pending the termination of the right to permanent immunity from forcible dispossession. The court not only answered this question affirmatively but went farther and held that, though the title to an office is a legal right and as such can be tried only in an action at law, to-wit, quo warranto, yet in a case such as the case at bar, where the primary relief sought is equitable, namely protection by injunction against dispossession by violent and unlawful means, and the question of title is incidental and germane to such primary relief, the incidental matter, i. e., the title to the de facto office may be litigated to effect, and the court may in one action determine the entire controversy. We have here then a virtual holding by the Wisconsin Supreme Court that the title to de facto office may be tried by injunction.†

The decision was much criticized. It was claimed that the doctrine is new and not warranted by precedent, that if carried to its limits it has a tendency to exclude those from public office whom the popular will has designated, and even the old hoax of judicial legislation was invoked. At first blush it seems that there is foundation in these contentions; but let us examine the doctrine

†Ekern v. McGovern, 154 W. 157.

here announced by the light of precedent, principle and authority, and then draw our conclusions.

It is a commonly accepted principle of universal application that an injunction will not issue when its object is to try mere naked title to public office. The authorities are unanimous on this proposition both in our own and other states.

State ex rel. Lochschmidt vs. Raisler, 113 Wis. 672.
State ex rel. McCaffery vs. Aloe, 152 Mo. 466.
Guillotte vs. Poiney, 41 La. Ann. 333.

The reason for this rule is stated in opinions and by text writers to be that such cases involve political rights, with which equity has nothing to do and that generally there is adequate remedy at law, namely by an action quo warranto.

But while the title to public office will not be determined in an injuncton proceeding, the principle that the possession of a de facto officer will be protected against interference of an adverse claimant whose title is in dispute is equally well supported by authority.

Stenglein vs. Beach, 128 Mich. 440.
School Dist. vs. Weise, 77 Minn. 167.
State vs. Alexander, 107 Iowa 177.
Neeland vs. State, 39 Kan. 154.
City of Huntington vs. Cast, 149 Ind. 255.

In the last cited case it was said: "The welfare and good order of society and government require that those engaged in the discharge of public duties should not be disturbed by claimants whose right to discharge their functions is as yet uncertain. Equity will protect the possession of the incumbents from any unlawful intrusion." Our state upon examination of the case, *Ward vs. Sweeney,* 106 Wis. 44, seems not to be in accord with this doctrine. There, some doubt is cast upon the power of a court of equity to protect a de facto officer from an intruder. It is argued that the legislature has marked the confines of injunctional relief and that under Sec. 2774 Wis. Statutes that remedy can be resorted to only in aid of a pending action, i. e., in the case under discussion, quo warranto. But as was clearly set forth by Justice

Marshall in his dissenting opinion the idea has not the support of long established principles. Power in equity as it existed at common law was lodged by the constitution in the courts. "The judicial power of this state both as to matters of law *and equity,* shall be vested in a Supreme Court, Circuit Courts, Courts of Probate and in Justices of the Peace." Wis. Const. Art. VII. Sec. 2. The legislature is powerless to restrict these constitutional grants and doubtless never intended so to do. Our court as early as *Trustees, etc. vs. Hoessli,* 13 Wis. 348, held that "when the complaint lays a foundation for an injunction it will be granted whether asked for as a final judgment or as a provisional remedy, in all cases where it would have been allowed under the old chancery practice." In *De Pauw vs. Oxley,* 122 Wis. 656, the court remarked on the subject of this statute, Sec. 2774: The statute "confessedly was intended to enlarge the duty of the court as it existed under the former chancery practice." Now in Pomeroy we read that the earliest jurisdiction, if not at one time the chief business of equity, was to prevent assaults, trespasses and a variety of outrages. These being the well established principles, it is difficult to see why the strong arm of equity should not extend to prevent a premeditated wrong to a person holding an office, performing his duties and believing in good faith to be thereto entitled. It may therefor be safely affirmed that in general, an officer de facto in possession is entitled to equitable interference to prevent forcible disturbance thereof other than in judicial proceedings.

We now come to the vital, all important question. Should a court vest, in a case of this sort, having reached a point calling for judgment vindicating the right to immunity from being forcibly dispossessed by illegal methods, leaving the more important question, the right to office undetermined. This question involves the proposition of how far the court may go as a matter of jurisdiction. It may be stated as a general rule, that whenever the court of equity has jurisdiction to grant the remedy of injunction for some special purpose, even though the injunction covers only a portion of the controversy, it may go on and decide all the issues and make a final decree granting full relief. This conception of equity jurisprudence has been steadily applied to a great variety of circumstances, litigations and reliefs.

State vs. McKay, 43 Mo. 594.

Chambers vs. Cannon, 62 Tex. 293.

Lynch vs. Metropolitan Elevated Ry. Co., 129 N. Y. 274.

Keith vs. Henkleman, 173 Ill. 137.

Furthermore, it has often been declared that this same principle is one of the fundamental and essential thoughts embodied in that great instrument, the "Code." That system of procedure by combining the actions at law and suits in equity into one "civil action," by permitting the union of legal and equitable primary rights and interests and causes of action in the one proceeding, and granting legal and equitable remedies in one judgment, has greatly enlarged the operations of the general doctrine above cited. It is within the spirit of the Code. But when on the other hand we inquire, in what kinds and what classes of cases this doctrine has been applied, we are unable to discover a single instance where it has been applied to a case of this sort, namely to proceeding to try title to office; nor are any cases to be found which say the court has not the power to proceed.

To sum up there are no direct precedents on either side of the controversy, but principle seems clearly to sanction the conclusion reached in the Ekern case. No valid reason appears why the principles stated should not have been applied. The mere circumstance that the principle had not been applied to such cases before should make no difference. "Principles should rule in the judicial field not mere precedents." The law should preserve the cast of a science; it has certain well defined principles and when occasion arises they should be applied to circumstances. No prejudice can occur to the parties themselves nor to the public by the final quieting of title in one action. Not to the parties, for every legitimate private interest will be best promoted by the entire settlement of the controversy at the earliest possible moment without the useless expenditure of time and money which would be involved in another action; not to the public, for surely the difficulties of high and important public officers, charging themselves at fisticuffs over who shall be officer and that at the very portals of the state capitol, are such which every peace-loving, law-abiding citizen desires to have speedily adjusted. Why then

should the court hesitate to break through the tradition that quo warranto is the only means of trying title when principle establishes the competency of a court so to do by injunction, where it is germane to a proper ground of equity action. An adherence to the tradition would be foreign to and inconsistent with the trend and policy of our Supreme Court, which has ever been a leader in the onward sweep of modern and progressive judicial determination, tearing down the network of technicalities, which have heretofore been so detrimental to the administration of justice. The Wisconsin Court has never been a worshipper of precedents. On the contrary, it has slaughtered many on numerous occasions and thereby rendered good service to the commonwealth. What special sanctity is attached to title to office that it should stand forth as capable of attack only by quo warranto. None whatsoever; unless it be the theory advanced that such office involve political rights and hence should be left to remedy of quo warranto determined upon by the people through the legislature. Those who argue thus should not be unmindful of the fact that this same people by its constitution invested the courts with full equity jurisdiction; the jurisdiction of equity having been established the contention advanced must fall.

The doctrine is not new but merely a new application of old principles. It is a step in the right direction, a step forward—a signal to advance. It is in accord with the progressive policy of our Court; in accord with the sentiment of the American Bar, voiced in the address of its president, Elihu Root, at the annual meeting of the Association in Chicago, Aug. 30, 1916, when he said: "The vast and continually increasing mass of reported decisions which afford authorities on almost every side of almost every question admonish us that by the mere following of precedent we should soon have no system of law at all, but the rule of the Turkish cadi who is expected to do in each case what seems to him to be right. We are approaching a point where we shall run into confusion unless we adopt the simple and natural course of avoiding confusion by classification, system, the understanding and application of generally recognized and accepted legal principles. It is continually more important that the Bar at large shall be trained to look through the precedents and the incidents to the controlling principles."